NO. 85-799

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

DALE A. MONROE,

Petitioner

versus

U. S. DEPARTMENT OF TREASURY,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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26

QUESTIONS PRESENTED

I

Whether an adverse action against a government employee is invalidated if the official who hears the oral response does not render a decision or make a recommendation to the official who does make the decision?

II

Whether an ex parte "secret" conference the night before the hearing between the agency attorney, an official, and an employee witness previously favorable to the accused employee, is an improper violation of due process protection for government employees?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 2

Grounds for Jurisdiction 2

Provisions, Statutes and Regulations Involved 2

Statement of the Case 3

Argument 5

Conclusion 9

Certificate of Service 11

Appendix

Appendix A - U. S. Court of Appeals for the Federal Circuit decision No. 84-1523, entered on August 15, 1985 ..... A-1

Appendix B - Merit Systems Protection Board decision No. CHO7528310112, May 11, 1984 ..... B-1

TABLE OF AUTHORITIES

Cases: Page

Cheney v. Department of Justice, 720 F. 2d 1280 (Fed. Cir. 1983) 7

Ricucci v. United States, 425 F. 2d 1252 (Ct. Cl. 1970) 6, 7

Swindell v. Veterans Administration, 10 MSPB 691 (1982) 7

Statutes:

5 U. S. C. § 7513 ..... 2, 7

5 U. S. C. § 7703 2

28 U. S. C. § 1254(1) 2

Regulations:

5 C. F. R. § 752.404(c) (2) 2, 3, 6

5 C. F. R. § 1201.56 (c) (3) 8

Rules:

Rule 17.1(c) Rules of the Supreme Court 2

IN THE
SUPREME COURT OF THE UNITED STATES
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NO.

DALE A. MONROE,

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v.

DEPARTMENT OF THE TREASURY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Federal Circuit rendered on August 15, 1985, appeal No. 84-1523.

OPINIONS BELOW

The Federal Circuit in a decision dated August 15, 1985, denied Petitioner's appeal (Appendix A) and affirmed the Merit Systems Protection Board's decision of May 11, 1984 (Appendix B).

GROUNDS FOR JURISDICTION

Petitioner seeks review by this Court of the Federal Circuit decision pursuant to Rule 17.1(c) of the Rules of the Supreme Court and 28 U. S. C. § 1254(1). (An appeal from a decision of the Merit Systems Protection Board to the Federal Circuit was made pursuant to 5 U. S. C. § 7703. The judicial and administrative decisions affirmed the removal from the service of former U. S. Treasury special agent Dale A. Monroe.)

PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The specific statute involved is 5 U. S. C. § 7513 which assures a government employee the right to respond orally and in writing to specific charges filed against him by his agency and a regulation which clarifies this statute: 5 C. F. R. § 752.404(c) (2).

One question in this case is also concerned with an interpretation of the due process clause of the Constitution of the United States.

5 U. S. C. § 7513 - Cause and procedure

(a) Under regulations prescribed by the Office of

> Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.
>
> (b) An employee against whom an action is proposed is entitled to—
>
> (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
>
> (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer.

5 C. F. R. § 752.404(c) (2):

> The agency shall designate an official to hear the employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action. The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provides one in its regulations in accordance with paragraph (g) of this section.

STATEMENT OF THE CASE

Special agent Dale A. Monroe, a 12 year veteran employed by the Bureau of Alcohol, Tobacco and Firearms (ATF), Department of Treasury, received a letter of proposed removal dated April 14, 1982. Subsequently, he was removed from service, and on November 9, 1982, appealed his dismissal to the MSPB regional office at Chicago.

The MSPB held a hearing and on January 17, 1984, the MSPB presiding official affirmed the agency action. Mr. Monroe

petitioned the MSPB to review the decision, and on May 11, 1984, the Board affirmed the MSPB regional decision to remove petitioner from his employment.

Petitioner sought judicial review in the Federal Circuit and on August 15, 1985, that court affirmed the Board decision that the employee was properly removed from service.

Petitioner was employed as a special agent, Bureau of ATF, at Valparaiso, Indiana, and had 12 years service. The agency served him with a "proposal" letter to remove him from service based on two principal allegations: that he falsified documents by claiming he had met an informant, Myron Johnson, when he had not, and that he claimed to be working at times when he was not.

Petitioner was told to make his oral reply to the "deciding official," Mr. Robert E. Sanders, the Deputy Director in Washington, D. C., and he did so. Mr. Sanders was later demoted to Regional Director at Chicago and he was removed as "deciding official" by the ATF. He (Mr. Sanders) prepared a synopsis of the oral reply but did not make a recommendation of any kind -- written or oral.

The "new" deputy director, Donald Zimmerman, actually made the removal decision and never talked to Mr. Sanders or received his recommendation; and he never talked to the petitioner.

The petitioner claims that the written synopsis of the oral hearing contained many errors and if he had known Mr. Sanders would not make the "decision" he could have corrected them.

Shortly after the "proposal" letter was served, several events occurred that required the agency to change its direction: Informant Johnson testified in federal court that he had worked with agent Monroe; other agents gave statements that petitioner had mentioned trying to work with the informant. The agency then changed its charges that he may have met informant Johnson ---but not as many times as he said.

Special agent Holmes gave a written statement that he had heard the petitioner mention Johnson, but at the hearing he

denied that. On the day prior to the hearing he was questioned in a hotel room by the agency attorney and deputy director Zimmerman. (Mr. Holmes was listed as petitioner's witness --- not the agency's. No notice of this interview was given to the petitioner or his attorney.)

ARGUMENT

The official who hears the oral reply of an employee must be the "deciding" official --- or he must make a recommendation to the official who does make the decision. If he is neither (that is, he hears the oral reply but does not make the decision or a recommendation to one who does), it is reversible error if the omission harmed the employee. It is only necessary that the employee point out that the procedural error denied the employee "some opportunity of avoiding dismissal, however slim."

The MSPB decision must be supported by substantial evidence. The testimony of a witness who changes his statement after being questioned in a secluded manner by a high agency official prior to the hearing, and the testimony of a witness who relates what he saw at the petitioner's home when he is unable to identify the petitioner's home, do not meet that standard.

The agency attorney and deputy director are acting improperly when they question one of the petitioner's witnesses in a secluded manner prior to the hearing; and this procedure is in violation of due process if it can be shown that the witness changed his anticipated testimony after the meeting.

The written proposal to remove petitioner was made by the Regional Director of Investigations, Mr. Aaron C. Elliott, and the petitioner's oral reply was to be made to the deciding official, the Deputy Director at Washington, Mr. Robert E. Sanders. That was properly accomplished; on June 4, 1982, Mr. Sanders heard his oral reply and a typed synopsis was prepared. (The petitioner contends that the synopsis was not entirely accurate.)

That is the last time in this case Mr. Sanders was heard from; he

did not make the decision and he did not make a recommendation to the official who did --- and he did not appear at the hearing to explain why. No explanation has ever been given to the petitioner as to why he could not make an oral reply to the official who was to make the decision or at least have a recommendation from the official who did receive the oral reply.

After he received the oral reply, Mr. Sanders was demoted and transferred to Chicago as the RDI and the decision to remove the petitioner was made by Donald Zimmerman, the newly installed Deputy Director, Criminal Enforcement at Washington.

The regulation, 5 C. F. R. § 752.404(c) (2), clearly intends that the official receiving the oral reply will be the official who makes the "decision," or if not, will make a recommendation to the person who does. (Otherwise there would be no point in exercising the oral reply procedure.) Mr. Sanders did neither; he did not make the decision and he did not make a recommendation to the official who did.

What would have been Mr. Sanders' decision or recommendation if he had made either? The only one who could possibly ever know that would be Mr. Sanders and this is why, perhaps, the agency did not have him at the hearing. It is illogical to assume that if he had made a favorable recommendation to Mr. Zimmerman that it would have been disregarded.

The meaning and purpose of the oral reply was judicially declared in *Ricucci v. United States*, 425 F.2nd 1252 at pg. 1255 (Ct. Cl. 1970):

> Taking the Regulation and Manual together, in summary, we read them as written for the protection of employees, and meaning that after adequate notice of charges and before dismissal, the accused employee may have an opportunity to discuss his case with an official of his agency. Not only may he state anything he pleased, from the number of mouths he has to feed to the alledged bias of his immediate supervisor, but he may

> expect help in presenting his case in form of such comments from the other side as would be natural from a person knowledgeable about the case and expecting largely to influence its resolution...Further, he has a right to expect that the "oral reply officer" will be one whose recommendation would be meaningful, not an empty formality. This would be normally assured if he was one of the deciding officer's circle of staff and line aides and advisers whom he regularly consults in such matters, unless the deciding officer has gone outside that circle for help for the employee's own better protection. In that case the record would show how the outsider's expertise was relied on.

The purpose of the "oral reply" as declared in *Ricucci* by the Court of Claims, was mandatorily accepted by the MSPB, but the Board limited the scope somewhat in *Swindell v. Veterans Administration*, 10 MSPB 691 (1982) by holding that the record must show some reasons tending to show that the outcome *might* have been different had the agency followed the correct procedure. The Congress mandated the right to make an oral reply to an employer as a substantial due process right for the employee --- not merely discretionary procedure that can or cannot be used by the agency. The statute provides "a reasonable time...to answer orally and in writing...." 5 U. S. C. § 7513(b) (2).

There is no way, of course, anyone could ever show with certainty that a different conclusion would have been reached by the deciding official if he had received a recommendation from the official who heard the oral reply. Recognizing this impossibility, this court, in *Cheney v. Department of Justice*, 720 F.2nd 1280, at p. 1285 (Fed. Cir. 1983) said that it was only necessary for the employee to prove the erroneous procedure denied him a "slim opportunity" to avoid dismissal.

> For the error to have been harmful, however, it must be shown that the erroneous procedure

> denied Mr. Cheney some opportunity of avoiding dismissal, however, slim, that the correct procedure, one or the other, would have permitted.

The Board's regulations provide that the burden is upon the petitioner to show harmful error, and that harmful error is that which "...*might* have caused the agency to reach a conclusion different than the one reached." (emphasis added)
5 C. F. R. 1201.56(c) (3).

The Federal Circuit denied Petitioner's argument and found that Monroe (Petitioner) "has not demonstrated the harmfulness of the error of the agency by a showing that the absence or cure of the error 'might have caused the agency to reach a conclusion different than the one reached.' " 5 C. F. R. § 1201.56(c) (3).

The crucial question, and the one the agency based most of its charges upon, was whether petitioner showed sign of, or had previously met, informant Myron Johnson at a meeting with Johnson and several other agents on December 30, 1982. After the issue came into dispute, special agent Ronald Holmes made a written statement that he (Holmes) had heard the petitioner mention Johnson's name "once or twice" while in the FBI office at Gary. (This was highly beneficial to the petitioner and would imply prior recognition of Johnson. Consequently, Holmes was listed as a witness for the petitioner--and not the agency.) (Administrative Record)

At the hearing, agent Holmes took the opposite stance on direct examination:

> *Question*: ....from the time you arrived at the FBI office, which was approximately 11:00 or 12:00 o'clock of December 30 until approximately 7:00 or 7:30, when you served the search warrant, did Special Agent Monroe tell you, or in some way indicate to you, that he knew the informant Myron Johnson?
>
> *Answer:* No, he did not.

The likely reason for this incredible switch in testimony was

brought out on cross examination by the petitioner's attorney: agent Holmes was assigned to pick up the agency attorney at the Chicago airport the day before the hearing and he carried him to a hotel where they met Mr. Zimmerman, the Deputy Assistant Director, where the three of them had a "conference" about the hearing the next day. The next day agent Holmes switched his testimony to favor the agency. Out of approximately 50 agents in Chicago, agent Holmes was selected to meet the agency lawyer at the airport.

The Petitioner strongly objected to this procedure before the MSPB but the Board did not mention the issue in its decision. (App. B)

The Federal Circuit said that the petitioner did not argue that some specific statute or regulation prohibited ex parte contacts between management and an employee's witness (who is also a government employee) the night before the hearing; therefore, the Federal Circuit did not find error in these contacts. (App. A)

CONCLUSION

The Federal Circuit has ruled a "deciding official" who hears an oral response from an employee concerning allegations against the employee, is not required to make a decision in the case---or make a recommendation to one who does make a decision.

It has also found that "secret" meetings between a management official, the agency lawyer and an employee witness previously favorable to the accused employee, the night before the MSPB hearing, are not improper and do not adversely affect due process protections for the accused employee.

The Supreme Court is urged to review this case and announce some due process procedural protection for government employees who chose to exercise a right mandated for them by the Congress; and some requirement that would strengthen the integrity of an administrative (MSPB) hearing.

Respectfully submitted,

WILLIAM M. PACE
Attorney for Petitioner

CERTIFICATE OF SERVICE

In compliance with the rules, I certify that I have this date served three copies of the above petition for writ of certiorari upon the Solicitor General of the United States, U. S. Department of Justice, Washington, D. C. 20520, and three copies upon the General Counsel, Department of Treasury, 15th Street and Pennsylvania Ave., N. W., Washington, D. C. 20220, by first class mail.

This the 6th day of November, 1985.

WILLIAM M. PACE

United States Court of Appeals for the Federal Circuit

DALE A. MONROE,
Petitioner,
v.
DEPARTMENT OF THE TREASURY,
Respondent.

Appeal No. 84-1523

DECIDED: August 15, 1985

Before BENNETT, SMITH, and BISSELL, *Circuit Judges.*

BENNETT, *Circuit Judge.*

This is an appeal from the order of the Merit Systems Protection Board (board), 20 M. S. P. R. 620 (1984), rendering final the initial decision of the presiding official issued December 13, 1983. We affirm.

BACKGROUND

Petitioner Monroe had served in the Bureau of Alcohol, Tobacco and Firearms (the agency) for 12 years and was employed there as a special agent when his removal was proposed for falsification of government documents concerning the hours of his work and his contacts with a potential agency informant. The specific falsifications referred to in support of the charge included (a) misleading entries in a report of investigation submitted by

Monroe to obtain approval for the use of the potential informant (Specification I), (b) six false or misleading diary entries concerning his meetings with the informant and his hours of work in other respects (Specification II), and (c) false entries on three administrative uncontrollable overtime reports (Specification III).

Monroe made an oral response to the charges before agency Deputy Director Sanders, the official initially designated to decide the case. Sanders, however, was transferred to another position and removed as deciding official. Without giving a recommendation or deciding on Monroe's proposed removal, Sanders prepared a written summary of the oral response hearing. This, together with a written statement by Monroe and other documents, was reviewed by the new deciding official, agency Deputy Director Zimmerman, who sustained all of the specifications and the proposed removal.

On appeal to the board, Monroe was afforded a full hearing where he was required by the presided official to detail all of his objections to the written summary of his oral response that had been prepared by Sanders. Thereafter, the presiding official submitted a thorough opinion reviewing the evidence and making explicit credibility determinations. Specification I was found not to have been supported by a preponderance of evidence, but all of the other specifications were sustained.

DISCUSSION

A. *Oral Response Hearing*

Monroe claims that his oral response to Sanders was given with the expectation that the latter would at least make a decision or a recommendation about the proposed removal. As this did not occur, and as Monroe was not notified that it would not, it is asserted that he was denied his right to a properly conducted oral response hearing. Monroe claims that he would have been more aggressive at the agency level in pointing out errors in the

summary by Sanders had he been advised of Sanders' true role in the process.

The conduct of the oral reply hearing is governed by 5 C. F. R. § 752.404(c) (2) (1983), which states:

> The agency shall designate an official to hear the employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action. The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provides one in its regulations in accordance with paragraph (g) of this section.

Monroe argues that this means the official who hears the oral answer of an employee must either make or recommend a final decision on the proposed adverse action. We disagree.

"The law is silent on whom the agency may designate to hear an employee's oral answer. The Office's regulations require that the person designated be one who has delegated authority in the agency to make or recommend a decision." *Federal Personnel Manual*, ch. 752, subch. 3-3g(5) (December 31, 1980). No decision of this court has suggested what form the personal interview at the agency level ought to take. In the published order in *Miller* v. *United States*, 227 Ct. Cl. 618, 619-20 (1981), in response to an argument similar to that made here by Monroe, it was stated that:

> Plaintiff mistakenly assumes that the person charged with making the final decision is the *only* appropriate party to conduct an oral reply. We find no authority to support...[this] position. What is required is that the person who hears the answer "shall be [selected from] persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made." (Emphasis in original.)

It has not been asserted that at the time of the oral response hearing Sanders lacked the authority to "make or recommend a

final decision."

When Sanders was reassigned within the agency, it was appropriate that he prepare a summary of the oral response by Monroe. That summary was made available to Monroe, who submitted his own response detailing points of disagreement. Both were reviewed by Zimmerman before making his decision on the proposed removal. Thus, all of the information and arguments that Monroe made in the course of his oral reply were before the deciding official.

Ironically, the effectiveness of the oral response hearing may have been undercut through a procedural strategy adopted by Monroe. Despite the desire of Sanders to go over each specification with Monroe, the latter, who was in the process of revising his written response to the proposed removal but did not have a copy with him at the hearing, declined to cooperate, in order to avoid being caught, as he put it, "in a contradiction."

Assuming arguendo that in the conduct of the oral response hearing procedural error could be shown, Monroe still would not prevail because he has not demonstrated that the failure of Sanders to make a recommendation denied him the opportunity of "avoiding dismissal, however slim." *Cheney* v. *Department of Justice*, 720 F.2d 1280, 1285 (Fed Cir. 1983). Monroe expressed to Sanders his own preference to rely on his written response as to many matters. This response and his critique of the summary of the oral reply prepared by Sanders were before the deciding official. We are at a loss, therefore, to understand what in Monroe's case Sanders could have considered that was not also before Zimmerman.

In short, Monroe has not demonstrated the harmfulness of the purported error of the agency by a showing that the absence or cure of the error "might have caused the agency to reach a conclusion different than the one reached." 5 C. F. R. § 1201.56(c)(3). This burden falls on Monroe. *Id.*; 5 U. S. C. § 7701(c)(2)(A). *See generally Shaw* v. *United States Postal Service*, 697 F.2d 1078, 1080 (Fed. Cir. 1983). "The court is not required to conjure up reasons why a procedure is harmful [merely] because of a bald

allegation of harmfulness alleging different reasons or none..." *Cheney*, 720 F.2d at 1285.

The circumstances of this case present nothing approaching the egregiousness of agency procedures condemned in *Ricucci* v. *United States*, 425 F.2d 1252, 1256 (Ct. Cl. 1970) (oral hearing before investigator chosen from outside employee's agency division for the apparent purpose of preventing employee "from learning anything he could use in his case") or in *Patterson* v. *United States*, 319 F.2d 882, 884-85 (Ct. Cl. 1963) personal hearing before inspector who developed the facts to substantiate proposed discharge). In *Cheney*, 720 F.2d at 1285, even the removal of a designated hearing officer after his inclination to mitigate the proposed penalty, while not favored by the court, was found not to have been harmful. Monroe has not shown that the conduct of his oral response hearing could have had an adverse impact upon him. *See also Swindell* v. *Veterans Administration*, 10 MSPB 691 (1982).

B. *Ex Parte Contacts*

Monroe complains that a witness whose name appeared on his own witness list was interviewed without notice to Monroe by the agency attorney and by Deputy Director Zimmerman the day prior to the hearing before the board. Allegedly, at the hearing the testimony of the witness was adverse to Monroe, in contrast to his previous favorable statements.

Stressing that Zimmerman would have been a superior officer of the witness, Monroe argues on the basis of *Sullivan* v. *Department of the Navy*, 720 F.2d 1266 (Fed. Cir. 1983), that this allegedly improper agency contact should void the decision against him. *Sullivan*, however, is not applicable. The ex parte contacts there were not between a witness and the opposing attorney or one of the agency superiors of the witness. Rather, of significantly more impact on the rights of the employee to an impartial evaluation of the proposal for his removal, in *Sullivan* "a true adversary [to the employee] with motives of reprisal sought to pressure the deciding official into making a decision to remove the

petitioner." *Id.* at 1272.

Further, it has not been argued that any statute or regulation prohibits the type of ex parte contacts of which Monroe complains. In the absence of such, we cannot find error in the contacts that resulted. *See DeSarno* v. *Department of Commerce*, 761 F.2d 657, 660 (Fed. Cir. 1985) (individual proposing removal and agency official deciding case may even be identical, absent contrary "statute, regulation, policy, directive, Board decision, or court decision"); *Welcker v. United States*, 752 F.2d 1577, 1582-83 (Fed. Cir. 1985); *Depte* v. *United States*, 715 F.2d 1481, 1484 (Fed. Cir. 1983). Thus, we hold that no procedural error occurred in this regard.

Even were error to have been made out, it has not been shown to have been harmful, as required to effect reversal of the board decision. At the hearing, the witness was subject to cross-examination which disclosed to the presiding official the meeting of the day before. This alone would seem to afford adequate due process protection. *See id.* In addition, the presiding official determined not to affirm the charge contained in Specification I, and it was toward that charge that the testimony of the witness involved was substantially pertinent. Thus, Monroe has suffered no harmful, reversible error through the ex parte contacts here at issue. *See Shaw*, 697 F.2d at 1080.

C. *Substantial Evidence*

Monroe asserts that the agency decision was not supported by substantial evidence, pointing out weaknesses in the evidentiary support for some of the charges against him. Nevertheless, a case without weaknesses is not what is required to sustain agency action upon review at this level. As stated in *Hayes* v. *Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984):

> We discharge our own duty when we apply section 7703 to review an MSPB decision regarding an adverse agency action to determine whether the contested decision complies with the applicable

> statute and regulations and whether it has a rational basis supported by substantial evidence from the record taken as a whole. The record need only disclose such relevant evidence as might be accepted by a reasonable mind as adequate to support the conclusion reached.

We find that the record here discloses that degree of relevant evidence as would support the conclusion of the board.

The appropriateness of the penalty has not been contested.

AFFIRMED

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DALE A. MONROE

v.

DEPARTMENT OF THE TREASURY

DOCKET NUMBER
CH07528310112

ORDER

Having fully considered the appellant's petition for review of the initial decision issued on December 13, 1983, and finding that it does not meet the criteria for review set forth at 5 C. F. R. § 1201.115, the Board hereby DENIES the petition.

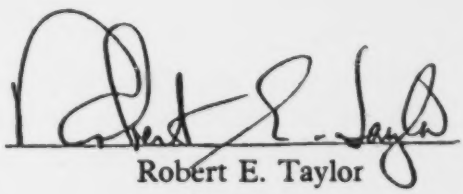
We find that appellant has failed to show harmful error in the agency's decision to change the deciding official after appellant made his oral reply to the charges. The summary of the oral reply, as well as appellant's written reply, were both considered by the new deciding official, and even in the absence of a specific recommendation by the reply official, appellant has presented nothing to suggest that if he had made a recommendation it would have been favorable and that upon receipt of such a recommendation it is likely that the deciding official would not have removed appellant. *See* 5 C. F. R. § 1201.56(c) (3); *Baracco* v. *Department of Transportation*, MSPB Docket No. DC075281F0895 (April 25, 1983); *Swindell* v. *Veterans Administration*, 10 MSPB 691 (1982). Moreover, appellant's assertions that the initial decision is contrary to the weight of the evidence are insufficient to show error. They identify no evidence which the presiding official failed to consider or other reason for the Board to re-evaluate the evidence and make new findings of fact. The presiding official's findings are properly given deference by the Board. *Weaver* v.

Department of the Navy, 2 MSPB 297 (1980).

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C. F. R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U. S. C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N. W., Washington, D. C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:



MAY 1 1 1984

(Date)
Washington, D. C.

Robert E. Taylor
Secretary